February 24, 1939.

OPINION NO. 1692

TAXATION, INHERITANCE; WILLS, APPLICABILITY TO PROPERTY DISPOSED OF BY.

According to the weight of authority, inheritance tax should be imposed in accordance with the will and not in accordance with the directions as to distribution of the property agreed upon between the parties.

SAME; RENUNCIATION OF WILL, EFFECT OF.

When property is received by an heir pursuant to a bona fide renunciation by the beneficiary named in the will, the inheritance tax is to be computed upon the transfer to the heir.

SAME; SAME.

In computing the inheritance tax, where part of the property passes under the will and part by intestacy pursuant to renunciation by the named beneficiary, the debts and administration expenses must be applied against the property passing by intestacy.

SAME; EXEMPTION OF PROPERTY PREVIOUSLY TAXED.

Act 152 (A-53) L. 1937 exempts property taxed within the previous five years although such former tax accrued before the enactment of this amendment.

SAME ; SAME.

Act 152 (A-53) L. 1937 should not be construed as creating a general deduction from the gross estate but on the contrary is an exemption of the particular property formerly taxed.

Mr. Norman D. Godbold, Jr.,
Registrar of Public Accounts,
Territory of Hawaii,
Honolulu, T. H.

Dear Sir:

We are in receipt of two letters with reference to the estate of Vernon Edward Tenney, deceased, raising two questions:

(1) As to the effect upon the inheritance tax of the Order of Probate dated July 8, 1938 and the agreement dated July 5, 1938 which also was filed in the probate proceeding according to the recitals of the Order;

(2) As to the application of Act 152 (A-53), L. 1937 to the property received by the deceased from the estate of his father Edward D. Tenney who died in 1934.

(1) As to the first question, your letter and the order and agreement above referred to show that

Hawaiian Trust Co., Ltd., offered an instrument for probate as the will of decedent, that this will left all the property to Winifred A. Tenney, then decedent's wife, that after the execution of the will the parties were divorced, that a sister, Wilhelmina Tenney, the sole heir in accordance with the intestacy laws, asserted that the will had been revoked by operation of law but did not contest the probate and instead effected a settlement of the dispute by entering into an agreement pursuant to which the will was probated and the sister received certain property and certain income from two trusts to be established pursuant to the agreement. The agreement provided that the agreement should be presented for the approval of the probate court and it was so approved. Pursuant to the agreement the order provided that the executor should distribute the assets in accordance with the arrangements so made.

As previously noted the decedent's sister, under the agreement, was to receive certain property outright and also certain income under trusts to be established. These items will be discussed separately.

(a) *As to the trust income.* I understand that the administrative practice in your office has been to impose the tax in accordance with the will and not in accordance with the directions as to distribution of the property agreed upon between the parties. This construction of the law has the support of very considerable authority, which I believe to be the weight of authority. Authorities both ways are cited in Gleason and Otis. Inheritance Taxation (3d Ed.) 94, in a note in 78 A. L. R. 716, and in footnotes 2 and 3 in the case of *Lyeth* v. *Hoey,* decided Dec. 5, 1938 in the Supreme court of the United States. These authorities deal with various situations and some of them are not in point on the precise question in hand but the fact remains that there is some conflict of authority. The present administrative practice should be continued, however. It

is in accordance with the rule, laid down as above stated by the weight of authority, that the effect of such a compromise simply is the same as an assignment by the legatee named in the will. There occurs a taxable transfer to the legatee named in the will, and the contestant takes only by virtue of the agreement entered into by the legatee, that is, by way of assignment. Such an assignment of course does not enter into computation of the tax. Approval of the agreement by the court and incorporation of the agreement into an order or decree do not affect the case. This rule is applicable to the computation of tax with respect to the trusts to be established and the gifts made pursuant to paragraphs 4-11 of the agreement. On pages 3 to 4 of the agreement it is recited that the beneficiary (Winifred A. Tenney) desires to make provision for certain persons and to provide for the creation of certain trusts, in order to carry out the desires of the deceased. None of these gifts or trust provisions affects the computation of tax in any way. Moreover, it is immaterial that the trust provisions are partly for the benefit of the decedent's sister (called the Heir in the agreement) the general rule above stated with respect to compromise agreements being applicable here.

The case of *Lyeth* v. *Hoey,* decided in the Supreme Court of the United States December 5, 1938, cited by attorneys for the estate, does not affect the matter in my opinion, This case relates to income tax and decides that the receipt of property by an heir in spite of a will and by virtue of compromise of his rights as an heir, is within the substance of the statutory exemption, for income tax purposes, of property acquired by "bequest, devise, or inheritance". The case does not purport to deal with the question here involved, which is: Did any part of the property of deceased pass by will or by the intestate laws of the Territory to any person other than Winifred A. Tenney? (Sec. 2060, R. L. 1935.)

(b) *As to the property which Wilhelmina Tenney received outright.* Pursuant to paragraph 2 of the agreement the sister of deceased was to receive certain property outright, and this was accomplished as follows: The beneficiary under the will, Winifred A. Tenney, renounced her rights under the will to this part of her legacy so that the decedent's sister, as heir, should receive such property under the intestacy laws as sole heir of the deceased. The fact that the beneficiary *renounced* her rights in this part of the property makes a great deal of difference. See *In re Cook's Estate,* 79 N. E. 991. When a legatee renounces, the property passes under the residuary clause or by intestacy. Here the legatee was the sole legatee, hence upon her renunciation the property necessarily passed under the intestate laws. This is not the same as the situation with respect to the trust income. There the will took effect and the beneficiary in turn set up the trusts, title passing from the deceased to the beneficiary and then to the trustees. Here, by reason of the renunciation the transfer was from the deceased to the heir. The result was a transfer to the heir, of the property enumerated in paragraph 2 of the agreement, and no transfer to the beneficiary under the will of such property.

The foregoing is subject to the qualification that the renunciation must be made in good faith. It may be a bona Fide renunciation though only of a part of the property, and though made in connection with the settlement of a contest. See *In re Merritt's Estate,* 155 App. Div. 228. 140 N. Y. S. 13. But in my opinion it would be lacking in good faith if there were any intention that the beneficiary under the will or any person designated by her should receive any benefit from or exercise any control over the property so renounced. The manner in which the agreement was performed may be inquired into. *(In re Merritt's Estate, supra.)*

As I understand it, the shares of Castle and Cooke, Ltd., included in the trusts established under paragraphs 4-11 of the agreement are not the same shares renounced by paragraph 2; and if in fact Winifred A. Tenney did renounce all interest in or control over so much of the provision made for her by the will as related to the property enumerated in paragraph 2 of the will this property then passed under the intestate laws to Wilhelmina Tenney and tax should be computed accordingly.

(2) As to the second question, i.e., *the application of Act 152 (A-53), L. 1937,* as I understand it, you are concerned only with the effect of the dates here involved. The applicability of the act may depend upon numerous other questions which are not dealt with here. The pertinent provision is as follows:

> "Sec. 2063-B. Property previously taxes exempt. When property has been subject to a tax under the provisions of this chapter, such property or other property acquired in exchange therefor, shall not again be subject to a tax under the provisions of this chapter within five years from the date of the death of the former decedent where the property can be identified as having been received by the later decedent from the former decedent or as having been acquired in exchange for property so received, unless the value thereof shall have appreciated, in which case the tax shall apply only to the amount of such appreciation."

While the general rule is that a statute is not presumed to be retroactive, application of the statute to the present matter is not retroactive. The statute is not constructed in such manner as to provide that the tax with respect to any property shall be a given amount for all transfers within a period of five years. Such a statute might raise a question of retroactive application where, as here, one decedent died April 29, 1934, the act took effect May 6, 1937, and the second decedent died November 4, 1937. On the contrary the statute is worded as an exemption of property which has been subject to a previous tax within five years. The

statute therefore applies to all cases of death after it becomes effective though the previous tax antedated the statute.

Application of the foregoing principles. The application of the foregoing principles raises certain further questions which I should like to call to your attention and then summarize the results. In the first place we have certain property, enumerated in paragraph 2 of the agreement, passing as undisposed of property under the intestate laws, and all other property passes under the will to Winifred A. Tenney, the disposition which she agreed should be made as to a part of this property being immaterial. In the second place, it should be noted that debts, administration expenses etc., are primarily payable out of personal property not disposed of by the will. 69 C.J. 1224, sec. 2567, 1227, sec. 2570. Though under the agreement all such debts and expenses were to be paid out of certain other property enumerated in paragraph 5 of the agreement, this was merely one of those terms of the agreement which cannot affect the inheritance tax. Therefore, all debts, administration expenses, etc., should first be deducted from the property passing by intestacy and only the surplus of such property is taxable as a transfer to Wilhelmina Tenney. In the third place, the exemption of property previously taxed should not be treated as a deduction from the gross estate but should be applied as an exemption, whereby the tax against the particular persons or persons to whom such previously taxed property passed under the will or by intestacy will be reduced.

Very truly yours,

RHODA V. LEWIS,
Deputy Attorney General.

APPROVED:

J. V. HODGSON,
Attorney General.